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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 879

SHIP-BY-TRUCK CO., INC., d/b/a GRAHAM SHIP-BY-TRUCK COMPANY,

AND

GRAVES TRUCK LINE, INC.,

Appellants,

VS.

UNITED STATES OF AMERICA

AND

INTERSTATE COMMERCE COMMISSION,

AND

STEVENS EXPRESS, INC., S & C TRANSPORT COMPANY, INC., and SPENCER BROTHERS, INC.,

Appellees.

JURISDICTIONAL STATEMENT BY APPELLANTS.

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Appellees.

JURISDICTIONAL STATEMENT BY APPELLANTS.

Appellants take this appeal from a final order and judgment of the United States District Court for the District of Kansas, entered October 5, 1962, denying relief prayed for in appellants' complaint wherein they requested

that the District Court set aside and annul certain orders of the Interstate Commerce Commission made and entered on the 23rd day of May, 1961. By this Statement, filed pursuant to Rule 13, and in conformity with Rule 15 of the Revised Rules of the Supreme Court of the United States, it will be shown that this Court has jurisdiction of the appeal, and that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

OPINIONS BELOW.

The opinion of the United States District Court for the District of Kansas, from which this appeal is taken, is reported at 208 F. Supp. 847, a copy of which opinion is appended hereto as Appendix "A". No separate findings of fact or conclusions of law, apart from those contained in the opinion, were entered by the District Court. The involved orders of the Interstate Commerce Commission are not reported and copies thereof are appended hereto as Appendices "B" and "C", respectively.

JURISDICTION.

This action was instituted by appellants pursuant to 62 Stat. 931, 28 U.S.C., Section 1336, to set aside, annul, suspend and enjoin the operation and enforcement of two orders of the Interstate Commerce Commission.

The case was argued on February 5, 1962, before a three-judge District Court as required by 62 Stat. 970, 28 U.S.C., Section 2325, and as specially constituted under the provisions of 62 Stat. 968, 28 U.S.C., Section 2284.

On September 6, 1962, the District Court issued its Memorandum Opinion and ordered the parties to appear

on October 5, 1962, at which time it would enter its final judgment herein. Appellants filed their Petition for Rehearing and/or New Trial, and argued the points raised therein before the Court on the assigned date, at the conclusion of which the Court entered its final judgment denying the relief sought.

Appellants filed their notice of appeal in the United States District Court for the District of Kansas on December 3, 1962. On January 30, 1963, the District Court enlarged the time for docketing the record on appeal to March 1, 1963.

Jurisdiction in this appeal is conferred by 62 Stat. 926, 28 U.S.C., Section 1253.

Jurisdiction to review on appeal the final judgment of the District Court is conferred upon this Court by 28 U.S.C., Section 1253 and 2101(b).

There are many decisions which sustain the jurisdiction of the Supreme Court to review on direct appeal the judgment of the specially constituted three-judge district court in this case. See: *Shafer Transportation Co.* v. *United States*, 355 U.S. 83 (1957); *American Trucking Associations* v. *United States*, 355 U.S. 141 (1957); *United States et al.* v. *Hancock Truck Lines, Inc.*, 324 U.S. 774, 65 S. Ct. 1003, 89 L. Ed. 1357 (1945); *Interstate Commerce Commission et al.* v. *Hoboken Manufacturers Railroad Co.*, 320 U.S. 368, 64 S. Ct. 159, 88 L. Ed. 107, Reh. Den. 321 U.S. 801, 64 S. Ct. 516, 88 L. Ed. 1088 (1943); *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125, 59 S. Ct. 754, 83 L. Ed. 1147 (1939).

QUESTIONS PRESENTED.

I.

Whether Section 5(10) of the Interstate Commerce Act, [Title 49 U.S.C.A., Section 5(10)], is applicable in exempting transactions from Section 5(2) of the Interstate Commerce Act, [Title 49 U.S.C.A., Section 5(2)] in regard to that part of Section 5(2), which states in pertinent part:

> "It shall be lawful, with the approval and authorization of the Commission, as provided in Subsection (b) - Subparagraph (i) * * *; * * for any person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; * * *."

Section 5(10) of the Interstate Commerce Act, [Title 49 U.S.C.A., Section 5(10)], states in pertinent part:

> "Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a transaction within the scope of paragraph (2) where the only parties to the transaction are motor carriers, subject to Part II (* * *), and where the aggregate number of motor vehicles owned, leased, controlled or operated by such parties for purposes of transportation subject to Part II does not exceed twenty."

II.

Whether Section 5(10), [Title 49 U.S.C.A., Section 5(10)], permits any person which is not a motor carrier, as defined by the Interstate Commerce Act, to receive the benefits of the exemptions in Section 5(10).

III.

Assuming, *arguendo*, the exemption in Section 5(10), [Title 49 U.S.C.A., Section 5(10)], does exempt a transac-

tion, whereby a non-motor carrier is attempting to acquire control of two or more carriers through ownership of their stock, or otherwise, from Section 5(2), [49 U.S.C.A., 5(2)], whether the exemption is applicable where the aggregate number of motor vehicles owned, leased, controlled or operated by all such parties, for purposes of transportation, subject to Part II of the Interstate Commerce Act, exceed twenty.

IV.

Whether the applications submitted by transferee and transferors to the Commission under Section 212(b) of the Interstate Commerce Act, [Title 49 U.S.C.A., Section 312(b)], are supported by such substantial, competent and probative evidence so as to permit the Interstate Commerce Commission to determine its jurisdiction and make findings of fact and conclusions of law in support of its final orders therein.

STATUTES INVOLVED.

The relevant portions of the Interstate Commerce Act involved provide:

Section 5(2):

"It shall be lawful, with the approval and authorization of the Commission, as provided in subsection (b) - subparagraph (i) * * *; * * for any person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; * * *." [49 U.S.C.A., Section 5(2)]

Section 5(10):

"Nothing in this section shall be construed to require the approval or authorization of the Commission

in the case of a transaction within the scope of paragraph (2) where the only parties to the transaction are motor carriers, subject to Part II (* * *), and where the aggregate number of motor vehicles owned, leased, controlled or operated by such parties for purposes of transportation subject to Part II does not exceed twenty." [49 U.S.C.A., Section 5(10)]

Section 212(b):

"Except as provided in Section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe." [49 U.S.C.A., Section 312(b)]

STATEMENT OF THE CASE.

The issues before this Court had their genesis in two application cases filed with the Interstate Commerce Commission under Section 212(b) of the Interstate Commerce Act. The ultimate question before the Court involves the jurisdiction of the Commission under Section 5(2) and 212(b) of the Interstate Commerce Act. In order to properly place the question in focus, it is necessary to detail the proceedings before the Commission.

On July 11, 1960, Stevens Express, Inc., a newly formed non-carrier corporation, and S & C Transport Company, Inc., a motor common carrier, filed a joint application with the Commission seeking authority under Section 212(b) of the Interstate Commerce Act for Stevens to purchase a portion of the operating rights (consisting of all regular route authority) of S & C. The application was docketed as No. MC-FC-63432. No information concerning the number of vehicles operated by the parties, or either of them, was furnished by applicants.

On September 30, 1960, the transfer board of the Commission issued an order denying the application upon grounds not material to the issues herein.

On October 13, 1960, the applicants jointly petitioned for reconsideration and for approval of the application subject to certain agreed conditions which would meet the objections of the transfer board.

On October 19, 1960, Stevens Express, Inc. (still a non-carrier) and Spencer Brothers, Inc. (a motor common carrier), filed a joint application seeking authority under Section 212(b) of the Act, for Stevens to purchase all of the operating rights of Spencer. This application was docketed as No. MC-FC-63698. The application listed Stevens as a non-carrier and Spencer as a motor carrier owning two units of highway equipment.

On December 7, 1960, Division 4 of the Commission, acting as an Appellate Division, granted applicant's petition for reconsideration in No. MC-FC-63432 (the S. & C. acquisition), and vacated and set aside the prior order of denial of the transfer board, approving the transfer subject to a condition revoking certain portions of the irregular route operating authority then held by S. & C. upon consummation of the transaction.

On February 1, 1961, the transaction between Stevens and S. & C. was consummated and the Commission was duly notified.

On February 24, 1961, the transfer board approved the sale and transfer by Spencer to Stevens in Docket No. MC-FC-63698. Both applicants were found to be carriers owning less than twenty vehicles.

On February 27, 1961, appellant Ship-By-Truck Co., Inc., filed a petition for waiver of Rule 1.101(e) of the

Commission's Rules of Practice, and to vacate and set aside the order of Division 4 dated December 7, 1960, on the ground that the rights to be transferred in No. MC-FC-63432 (the S. & C. matter), were dormant.

On March 17, 1961, Topeka Motor Freight, Inc., filed a petition for waiver of Rule 1.101(e) of the Commission's Rules of Practice, and for reconsideration in Docket Nos. MC-FC-63432 and MC-FC-63698, alleging dormancy of the S. & C. and Spencer rights.

On March 20, 1961, Ship-By-Truck Co., Inc., filed a petition for reconsideration in the Spencer case (No. MC-FC-63698) alleging dormancy of the rights to be transferred.

On March 21, 1961, Stevens replied to the petition of Ship-By-Truck Co., Inc., in the S. & C. case (No. MC-FC-63432) stating (1) that no waiver of the time requirement to file a petition for reconsideration was warranted, (2) that the transaction had already been consummated, and (3) that the regular routes of S. & C. sought to be transferred were not dormant.

On March 21, 1961, Ship-By-Truck Co., Inc., filed a motion to set aside the S. & C. and Spencer orders on the jurisdictional grounds that the two applications must be considered together under Section 5 because a non-carrier was attempting to purchase two motor carriers and the total number of vehicles involved exceed twenty.

On March 22, 1961, Graves Truck Line, Inc., filed a petition for waiver of Rule 1.101(e) and for reconsideration in the S. & C. and Spencer cases, alleging dormancy of the rights to be transferred.

On April 3, 1961, Stevens answered, objecting to waiver of Rule 1.101(e), and to the motion to set aside on jurisdictional grounds.

On May 23, 1961, Division 3, acting as an appellate division, entered two separate orders, one in each case, granting waiver of Rule 1.101(e), accepting the petitions and motions for filing, and denying the petitions and overruling the motions to set aside the orders on jurisdictional grounds.

Their administrative remedies exhausted, appellants challenged the lawfulness of the Commission's actions by a suit filed in the United States District Court for the District of Kansas, docketed as Civil Action No. KC-1564, on June 6, 1961. Concurrently therewith, appellants filed their application for a temporary restraining order, which was heard on the 8th day of June, 1961, before Honorable Arthur J. Stanley, Jr., Judge of the United States District Court for the District of Kansas. A restraining order was filed June 12, 1961, enjoining the Commission from issuing certificates of public convenience and necessity to Stevens Express, Inc.

The District Court, three judges sitting, heard the case on oral argument on February 5, 1962. Its Memorandum Opinion denying appellants the relief sought was issued on September 6, 1962, and judgment dismissing appellants' complaint was entered on October 5, 1962. In its opinion, the District Court found that the Commission had not abdicated its jurisdiction in the handling of the two applications under Section 212(b) of the Act, and in support thereof found as follows:

> "Applying the foregoing principles to the transactions involved in the case at bar, it is clear the transfer from S. & C. to Stevens was consummated on February 1, 1961, at which time Stevens was a non-carrier. Thus, the transfer was from a carrier to a non-carrier, and, therefore, it was not subject to Section 5.

The order approving the transfer from Spencer to Stevens was entered on February 24, 1961, and Stevens was found to be a carrier at that time. However, this transaction did not involve more than twenty vehicles and accordingly, it was exempted from Section 5 by the provisions of Section 5(10).

As to plaintiff's contention that the two transfers constitute a single transaction, there is no evidence to support it. The record does not disclose that the two transferors, S. & C. and Spencer, knew of the other's proposed sale or were in any way connected or were affiliated with each other or the transferee, Stevens. The contracts entered into between the parties providing for such transfers were separate and independent of each other and the applications for transfer were filed separately and at different times. The allegations presented by plaintiffs in an effort to show a scheme or inter-dependency between the two transactions were considered by the Commission and rejected. We cannot say the Commission erred in this respect."

THE QUESTIONS ARE SUBSTANTIAL.

The Interstate Commerce Act provides that the Interstate Commerce Commission may authorize mergers and other forms of acquisition and control. Conditions precedent to this authorization require the Commission to find that the transaction is consistent with the public interest and to determine that, if approved, the acquiring or controlling carrier be able to operate the acquired properties to public advantage in its operations and authorization of the transaction will not unduly restrain competition. [49 U.S.C. 5(2) (b)]

In making this determination, the Commission must give weight to the effect of the proposed transaction upon

adequate transportation service to the public, *inter alia*. [49 U.S.C. 5(2) (c)]

The Act specifically provides that it is unlawful for any person, without the approval of the Commission, to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. [49 U.S.C., Sec. 5(4)]

Section 5(2) of the Act specifically contemplates prior approval of a transaction as a condition precedent to the consummation thereof, wherein the operating rights of two carriers are sought to be acquired by a non-carrier.

In the matter before the Court here, we contend that the specific language and purpose of the Act has been circumvented. This was done by (1) approving one application, holding that the acquiring party was not a motor carrier, therefore not subject to the provisions of the Act, (2) then approving the second application, finding that the acquiring party was a motor carrier acquiring a motor carrier, and finding the total number of vehicles owned, operated, leased or controlled for purposes of transportation subject to Part II of the Act did not exceed twenty, the transaction was exempted from Section 5(2) by the provisions of Section 5(10), and therefore subject to handling under the transfer rules promulgated pursuant to the language in Section 212(b) of the Act. (49 C.F.R. 179)

In upholding this method of approving the transaction, the Court found that the Commission has a large area of "discretion" in interpreting the statute and unless clearly erroneous, the Court is powerless to disturb the Commission's orders.

It is appellants' contention that the language of the statute is clear and if the precedent established by the Commission, and upheld by the Court, in this case is allowed to stand, not only these appellants, but those similarly situated, will be deprived of their statutory remedy in the protection of their businesses. This precedent will permit the bringing together of certificates into one controlling party without it being required to place substantial, competent or probative evidence before the Commission on which it can determine the impact upon existing service; and will deprive these appellants, and others similarly situated, of any procedure whereby evidence can be submitted to the Commission in opposition to the proposed transaction, thereby nullifying the impact of the pertinent portion of Section 5(2). This precedent allows the Commission to avoid its jurisdiction under Section 5(2) in the disposition of two applications filed under Section 212(b) for acquisition by a non-carrier of the operating rights of two carriers simply by approving one, before considering the other.

The Commission urged, and the Court found, that jurisdiction attaches at the time of consummation of the transaction. Although true, it is not the kind of jurisdiction which controls in the decisional process. The jurisdiction of which the Court speaks is that of a regulatory nature, viz., that when an entity becomes a carrier, then the Commission has "jurisdiction" to regulate the activities of the carrier. In this the Court erred.

The filing of an application commences the Commission's jurisdiction over the "case". The jurisdiction of the Commission over a "carrier", absent any proceeding, commences when the carrier becomes such. Here, the Commission had jurisdiction over both "cases" when Stevens was not a "carrier" for some three and one-half months

prior to consummation of the S. & C. transaction, at which time Stevens became a "carrier" over which the Commission had jurisdiction in the enforcement of its regulatory functions under the Act. The distinction must be made by recognizing that the processing of the application is a quasi-judicial matter over which the Commission must have "jurisdiction" before it can act. The act of regulating a "carrier" is quasi-legislative which attaches and affects only the operations of "carriers" as they are defined in the Act.

Thus, the Commission acquired jurisdiction over the applications upon the filing thereof and both applications were concurrently pending final determination for some three and one-half months before Stevens became a "carrier" subject to Commission "jurisdiction". Section 5(2) requires approval of the Commission where a non-carrier seeks to acquire two or more carriers. Section 5(10) exempts the matter from Section 5(2) only when *all* the parties to the transaction are "motor carriers".

If Congress had meant for the overriding purpose of the Act to be nullified simply by the phraseology of a contract or, as here, a lack of any evidence of a contract, then surely it would have said so. The cardinal rule of construction to be followed is to determine the intent of the Congress and the purpose to be accomplished by the enacted statute. The rule is well stated in 82 C.J.S., pages 705-712, Section 346, where it is said:

> "Provided always that the interpretation is reasonable and not in conflict with the legislative intent, it is a cardinal rule of construction of statutes that force, meaning, significance, or effect must be given, if possible, and if it can fairly and reasonably be done, to the whole statute in every part, and section, and provision thereof, and to all the language employed or

contained therein, according to the decisions on the question, including every word, term, phrase, expression, clause, sentence, and paragraph, so that no part will become inoperative, and so as to render the statute a harmonious, consistent, and symmetrical whole."

The statute contemplates in specific terms that approval and authorization of the Commission is necessary in several situations.

These are: (1) where two or more carriers desire to consolidate or merge their properties or franchises into one corporation; (2) for any carrier or two or more carriers jointly to purchase, lease, or contract to operate the properties or any part thereof of another; (3) for any carrier or two or more carriers jointly to acquire control of another through ownership of its stock or otherwise; (4) *for a person which is not a carrier to acquire control of two or more carriers through ownership or otherwise;* and (5) for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise. Although the words of the statute are clear, the Commission has injected a "dependency test". Its orders of May 3, 1961, phrase this test, or its finding upon this test, as follows:

> "* * * that the transaction was not subject to Section 5; and that it was not related to, or dependent upon, the transfer proposed in the then pending application in No. MC-FC- (naming the companion application)." (Appendices B and C)

The Court, in sustaining the Commission's position, placed the burden upon the protestants to establish the Commission's jurisdiction in the following words and phrases:

> "As to plaintiff's contention that the two transactions constitute a single transaction, there is no evi-

dence to support it. The record does not disclose that the two transferors, S & C and Spencer, knew of the other's proposed sale or were any way connected or affiliated with each other or the transferee, Stevens."

This attempted justification for approving the applications separately under Section 212(b) places the "symmetrical whole" of the statute out of balance and injects a foreign element which the clear words of the statute indicate that Congress did not contemplate. Reference to the record before the Commission will reflect that no contracts were submitted to the Commission for consideration by the applicants in either case. The result of the approval of the two applications under Section 212(b) enables the acquiring corporation, Stevens, to combine the operating rights of the two vendors and provide a new service in direct competition with the service performed by appellants.

The Commission and the Court have been blinded with the procedural aspects involved and have failed to consider the results. The ultimate result must be consistent with Section 5(2); and that result cannot be accomplished by the conclusions here under attack.

We submit that jurisdiction is a primary issue, and that determination thereof by the Commission must be made in the first instance prior to reaching the merits of the application. As a result of the approval of these two applications, Stevens will be able to provide service between Kansas City and Topeka which was not possible before, except through interline of traffic. It will also be able to provide service between Kansas City and St. Joseph, Missouri, which was not possible before, and it will be able to provide service between St. Joseph, Missouri, and Topeka, Kansas, which was not possible before. There are other possibilities which could be mentioned. If one

of the carriers had attempted to merge into or purchase the operating rights of the other carrier, there would be no question but that the transaction would require approval of the Commission under Section 5 of the Act. It is also urged that even if the "dependency" test is applicable under the statute, which we contend it is not, the Commission has, in effect, required no proof from the applicants, who are in the only position to provide affirmative proof, as to jurisdiction and instead has stated that a presumption exists contrary thereto, rebuttable only by protestants.

We respectfully submit that the question presented to the Court here is so substantial that it deserves plenary consideration. Abdication of jurisdiction by the Commission, as is so evident in this case, permits avoidance of Section 5 in many situations which can not be even contemplated at this time.

By virtue of Section 5(11) [49 U.S.C. Section 5(11)] carriers attempting a merger, control, consolidation or purchase are "hereby relieved from the operation of the Antitrust Laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or Municipal, * * *". To allow such loose play with the considerations of jurisdiction by the Commission will give birth to multitudinous schemes by carriers with no effective legal restraint to handicap them.

For the reasons hereinabove set forth, and premises considered, it is submitted that a question of substantial Federal importance is presented by this appeal. None of the issues involved is of trivial consequence, either legally or with respect to appellants, the Commission or the motor carrier industry of the nation. We respectfully submit that the arguments of appellants are conceived upon sound and meritorious foundations in law and legal theory and

are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

We respectfully request that probable jurisdiction be noted herein.

Respectfully submitted,

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APPENDIX

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS.

SHIP-BY-TRUCK CO., INC., d/b/a GRAHAM SHIP-BY-TRUCK COMPANY;
GRAVES TRUCK LINE, INC.;
TOPEKA MOTOR FREIGHT, INC.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
Defendants,
STEVENS EXPRESS, INC.;
S. & C. TRANSPORT COMPANY, INC.;
and SPENCER BROTHERS, INC.,
Intervening Defendants.

Number KC-1564

Tom B. Kretsinger and Jeff Robertson, Attorneys for Plaintiffs;

Lee Loevinger, Assistant Attorney General, John H. D. Wigger, Attorney, Department of Justice, and Newell A. George, United States Attorney, for the United States of America;

Robert W. Ginnane, General Counsel, Arthur J. Cerra, Assistant General Counsel and Harry Horak for the Interstate Commerce Commission.

Memorandum Opinion.

(Filed September 6, 1962.)

Before HILL, Circuit Judge, STANLEY, Chief Judge of the United States District Court, and BOHANON, United States District Judge.

HILL, Circuit Judge:

This is a civil action brought under the provisions of Sections 1336, 1398, 2321-2325 of Title 28 U.S.C., to set aside and annul orders of the Interstate Commerce Commission (Commission) entered in Docket No. MC-FC-63432, Stevens Express, Inc., Transferee, and S. & C. Transport Co., Inc., Transferor, and Docket No. MC-FC-63698, Stevens Express, Inc., Transferee and Spencer Bros., Inc., Transferor. The effect of these orders was to grant approval, under Section 212(b) of the Interstate Commerce Act (49 U.S.C. § 312(b)),[1] to a proposed sale and transfer by S. & C. Transport Co., Inc., (S. & C.) to Stevens Express, Inc., (Stevens) of a portion of the former's operating rights and by Spencer Bros., Inc., (Spencer) to Stevens of all of Spencer's operating rights.

The facts may be summarized as follows: Separate proceedings were instituted at different times and by separate orders, the Commission approved the acquisition by Stevens of a portion of the operations and a portion of the certificate of S. & C. and the business and certificate of Spencer. The separate orders were based on the transfer rules prescribed under Section 212(b). The plaintiffs contend that the two transactions should have been regarded

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1. Section 312(b) provides:

"Except as provided in Section 5 of this title, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe."

as one transaction involving the acquisition by a person of control of two or more carriers within Section 5(2) of the Act (49 U.S.C. § 5(2)),[2] and the Commission should have determined the transactions under Section 5(2).

On July 11, 1960, Stevens, a newly formed non-carrier corporation, holding no certificate of public convenience and necessity, and S. & C., a motor common carrier, filed a joint application with the Commission seeking authority under Section 212(b) for Stevens to purchase a portion of the operating rights of S. & C. The application was docketed and on September 30, 1960, the Transfer Board of the Commission issued an order denying the application, holding that the rights to be sold were not clearly distinguishable and severable from the remaining operating rights S. & C. would retain. Shortly thereafter the applicants jointly petitioned for reconsideration and for approval of the application subject to an agreed condition revoking that portion of the retained operating rights of the transferor, S. & C., upon consummation of the transaction, which duplicated those being transferred. On December 7, 1960, Division 4 of the Commission acting as an

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2. Section 5(2)(a) provides:

"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties or any part thereof, of another; or for any carrier or two or more carriers jointly to acquire control of another through ownership of its stock, or otherwise; *or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise;* or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise: * * *" (Emphasis supplied).

Appellate Division, granted applicants' petition for reconsideration, vacated and set aside the prior order of denial entered by the Transfer Board, and approved the transfer subject to a condition revoking that portion of the irregular route operating rights of the transferor, upon consummation of the transaction, which duplicated the regular route authority transferred. This order was duly published in the Federal Register on December 14, 1960, at page 12,851 and notification was given to the Commission that the transaction was consummated on February 1, 1961.

On October 19, 1960, Stevens and Spencer filed a joint application seeking authority under Section 212(b) of the Act, for Stevens to purchase all of the operating rights of Spencer. This application, docketed as No. MC-FC-63698, listed Stevens as a non-carrier and Spencer as a motor carrier owning two units of highway equipment. The Transfer Board approved the sale and transfer by Spencer to Stevens on February 24, 1961. Both applicants were found to be carriers owning less than 20 vehicles. This order was duly published in the Federal Register on March 3, 1961 at page 1890.

The plaintiffs filed petitions for waiver of Rule 1.101 (e), (which required petitions for rehearing, etc., to be filed within 30 days from date of service of the order in question) and to vacate and set aside the orders authorizing the above transfers from S. & C. to Stevens and Spencer to Stevens, on the grounds that the rights transferred were dormant.

Stevens answered generally stating, (1) no waiver of the time requirement to file a petition for reconsideration was warranted, (2) that the transactions were already consummated, and (3) that the regular routes of S. & C. transferred were not dormant.

On March 21, 1961, a motion was filed to set aside the S. & C. and Spencer orders on the jurisdictional grounds that the two applications must be considered together under Section 5, because a non-carrier is attempting to purchase two motor carriers and the total number of vehicles involved exceed twenty.

Division 3 of the Commission, acting as an Appellate Division, on May 23, 1961, issued two separate orders, one in each case granting waiver of Rule 1.101(e), accepting the petitions and motions for filing, denying the petitions and overruling the motions to set aside the orders on jurisdictional grounds.

The present action was commenced and the court issued a temporary restraining order enjoining the defendants from issuing certificates of public convenience and necessity to Stevens.

The sole issue before the court is whether the Commission acted within the scope of its jurisdiction in approving the purchases under the Transfer Rules issued pursuant to Section 212(b) of the Act.

The plaintiffs contend that the proposed purchase by the non-carrier Stevens of a portion of the operating authority of S. & C. and thereafter, by a subsequently filed application, the proposed purchase by carrier Stevens of the operating authority of Spencer, both operating less than 20 vehicles, constitutes a single transaction requiring approval under Section 5 for the reason that any unification of S. & C. and Spencer would require approval under Section 5. Therefore, they argue, public policy requires that non-carrier Stevens attempted purchase of the operating rights of these two carriers in separate transactions be found to constitute a subterfuge to avoid jurisdiction under Section 5.

Plaintiffs point out that the Commission approved the S. & C. transaction on December 7, 1960, with the consummation occurring on February 1, 1961, and the application to purchase Spencer was filed on October 19, 1960. Therefore, they maintain Stevens was a non-carrier purchasing Spencer, a carrier, and the status of the parties in both applications was the same from October 19, 1960, until February 1, 1961. They then conclude that a non-carrier corporation was attempting to purchase the operating authority of two motor carriers with both applications pending concurrently and this situation falls squarely within the statutory language of § 5(2).

The defendants, on the other hand, maintain the status of the parties as of the date of actual consummation is controlling in determining whether the provisions of § 5 are applicable. The Commission has so held, *Davis-Purchase-Lambrecht*, 66 M.C.C. 779; *Baggett Transp. Co. Purchase-North Alabama M. Exp., Inc.*, 57 M.C.C. 690.

In determining whether the Commission acted within its authority in permitting the sales and transfers to Stevens, under § 212(b), rather than requiring its approval under § 5, we must examine the transactions in the light of the statutory language and the Congressional purpose. That purpose in the enactment of Section 5 was to facilitate mergers and consolidations in the national transportation system. The language of the statute expresses the clear desire of Congress that the transportation industry proceed toward an integrated system through substantial corporate simplification. *County of Marin* v. *United States*, 356 U.S. 412, 78 S. Ct. 880, 2 L. Ed. 2d 879.[3] And, the effect of § 5, making it lawful for two or more carriers to consolidate

3. For a more detailed history of § 5, see *St. Joe Paper Co.* v. *Atlantic C. L. R. Co.*, 347 U.S. 298, 74 S. Ct. 574, 98 L. Ed. 710.

or merge their properties or franchises, etc., with the approval and authorization of the Commission, is to permit the lawful accomplishment of transactions which would otherwise be unlawful. *Railway Labor Executives' Ass'n* v. *United States*, 151 F. Supp. 108 (D.C. D.C. 1957).

Section 5 provides for the merger or consolidation of the properties, franchises, etc., of any two or more carriers, for the purchase lease, contract to operate the properties or acquiring control of any carrier or two or more carriers by any other carrier and for acquiring control through ownership of stock or otherwise of any two or more carriers by a non-carrier. Among other things, the Commission must approve and authorize the transaction before it may be accomplished, and the proposed transaction must be consistent with the public interest and conform to the standards therein specified.

However, not all transactions involving sales and transfers are subject to § 5. Section 5(10) provides that "Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a transaction within the scope of paragraph (2) of this section where the only parties to the transaction are motor carriers * * * and where the aggregate number of motor vehicles owned, leased, controlled or operated by such parties, for purposes of transportation * * * does not exceed twenty."

Thus, Congress has provided a specific exemption from § 5 for these small carriers where the total number of vehicles involved does not exceed twenty. In those situations, a transfer of a certificate is governed by § 212(b) which reads as follows:

"Except as provided in section 5 of this title, any certificate or permit may be transferred, pursuant to

such rules and regulations as the Commission may prescribe."

The rules and regulations prescribed by the Commission are found in 49 C.F.R. 179.

As stated by the Supreme Court in *United States* v. *Resler*, 313 U.S. 57, 59, 61 S. Ct. 820, 85 L. Ed. 1185, 1186:

> "The obvious sense of § 212(b) could hardly be expressed more aptly than in the language quoted. Section 213(e) [now § 5(10)] is equally explicit. Read together, the two sections can mean only that a transfer involving not more than twenty vehicles is governed by § 212(b) and the regulations enacted pursuant to it. * * *"

The Commission set forth the distinction between § 5 and § 212(b) in *Atwood's Transport Line-Lease-Clark*, 52 M.C.C. 97, at page 107, as follows:

> "The national transportation policy was not intended to eliminate the distinction between sections 5 and 212(b), as specifically set forth in those separate sections of the act. It was only necessary that the national transportation policy be kept in mind when the Commission prescribed the rules and regulations governing transfers of certificates and permits, its sole power under section 212(b). Section 5 is principally concerned with *the bringing of two or more carriers under control or management in a common interest.* For these small carriers desiring to effect the transfer of a certificate or permit from one to the other, a specific exemption was provided in section 5(10), and other transfers of a certificate from a carrier to a person, not a carrier and not affiliated with a carrier, are not subject to section 5. The intent of the Congress obviously was to provide a means whereby such transfers could be effected easily and without delay under such rules as the Commission deemed appropriate. As stated by the court in *Stearn* v. *United*

States, supra, (87 F. Supp. 596), it was 'the Congressional intent that operating rights' under section 212(b) 'might be freely transferred so long as the public interest was not harmed thereby.' "

It is a familiar rule of statutory construction that an administrative interpretation of a statute by the agency charged with its application and enforcement, though not controlling or binding upon the courts, is entitled to great weight. *County of Marin* v. *United States,* 356 U.S. 412, 420, 78 S. Ct. 880, 2 L. Ed. 879, 885; *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124, 129; *United States* v. *American Trucking Associations,* 310 U.S. 534, 549, 60 S. Ct. 1059, 84 L. Ed. 1345, 1354; *Mitchell* v. *Greinetz,* 10 Cir., 235 F.2d 621.

Applying the foregoing principles to the transactions involved in the case at bar, it is clear the transfer from S. & C. to Stevens was consummated on February 1, 1961, at which time Stevens was a non-carrier. Thus, the transfer was from a carrier to a non-carrier and, therefore, it was not subject to § 5.

The order approving the transfer from Spencer to Stevens was entered on February 24, 1961, and Stevens was found to be a carrier at that time. However, this transaction did not involve more than twenty vehicles and accordingly it was exempted from § 5 by the provisions of § 5(10).

As to plaintiff's contention that the two transfers constitute a single transaction, there is no evidence to support it. The record does not disclose that the two transferors, S. & C. and Spencer, knew of the other's proposed sale or were in any way connected or affiliated with each other or the transferee, Stevens. The contracts entered into between the parties providing for such transfers were

separate and independent of each other and the applications for transfer were filed separately and at different times. The allegations presented by plaintiffs in an effort to show a scheme or interdependency between the two transactions were considered by the Commission and rejected. We cannot say the Commission erred in this respect.

We conclude the transactions here in question are not subject to § 5 and the Commission acted within its authority in permitting the transfers from S. & C. and Spencer to Stevens under § 212(b). The seperate orders of the Commission approving such transfers are therefore sustained. The temporary restraining order enjoining defendants from issuing certificates of public convenience and necessity to Stevens is dissolved.

APPENDIX B.

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 23rd day of May A. D. 1961

No. MC-FC 63432

STEVENS EXPRESS, INC.,
HUTCHINSON, KANSAS,
TRANSFEREE

AND

S. & C. TRANSPORT COMPANY, INC.,
SOUTH HUTCHINSON, KANSAS,
TRANSFEROR

Upon consideration of the record in this proceeding and of the petitions of Ship-By-Truck Company, Inc., doing business as Graham Ship-By-Truck, Kansas City, Mo., filed March 27, 1961, of Graves Truck Line, Inc., Salina, Kans., filed March 22, 1961, and of Topeka Motor Freight, Inc., Topeka, Kans., filed March 23, 1961, for waiver of the Rules and acceptance of late-filed petitions for reconsideration, tendered therewith, of the order of the Commission, Division 4, acting as an Appellate Division, entered December 7, 1960, granting the application under Section 212(b) of the Interstate Commerce Act, and the Rules and Regulations Governing Transfers of Rights to Operate as a Motor Carrier in Interstate or Foreign Commerce (49 C.F.R. 179), and for oral hearing, and for consolidation of the proceeding with No. MC-FC 63698, Stevens Express, Inc.,—

Purchase—Spencer Bros., Inc., of the motion of Ship-By-Truck Company, Inc., to vacate and set aside all orders herein for the reason that the transaction is subject to Section 5 of the said Act; and of applicants' replies:

It appearing, That notice of the order of the said Division was duly published in the Federal Register on December 14, 1960, that the wording of the said notice followed the usual form and such notice was not intended as a detailed and exact description of the operating rights involved, because such information is contained in the application on file in the offices of this Commission at Washington, D. C., and at the offices of the District Director and the State Commission where the headquarters of the carriers involved are located, and may be examined at those offices; that the said order of December 7, 1960, became effective on January 18, 1961, in the absence of any petitions being filed and the transaction was consummated by applicants on February 1, 1961; that prior to consummation transferee was not a carrier subject to the said Act or affiliated with such a carrier; that the transaction was not subject to section 5; and that it was not related to, or dependent upon, the transfer proposed in the then pending application in No. MC-FC 63698;

It further appearing, That the petitions and motion set forth no facts or arguments which were not previously considered or which would establish that the transfer was subject to section 5, that it should have been consolidated with No. MC-FC 63698, or that the transfer was not properly approved under the said Rules, including sections 179.5 (a) and 179.5(b) thereof; and that other contentions of petitioners concern matters not pertinent to a determination of this proceeding, and that an oral hearing is not necessary to a determination of the matter:

It is ordered, That the requests for waiver of the Rules be, and they are hereby, granted, that the petitions and motion be, and they are hereby, accepted for filing, that the petitions be, and they are hereby, denied, and that the motion be, and it is hereby, overruled.

By the Commission, Division 3, acting as an Appellate Division.

Harold D. McCoy,

(Seal) Secretary.

APPENDIX C.

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 23rd day of May A. D. 1961

No. MC-FC 63698

STEVENS EXPRESS, INC.,
HUTCHINSON, KANSAS,
TRANSFEREE

AND

SPENCER BROS., INC.,
LAWRENCE, KANSAS,
TRANSFEROR

Upon consideration of the record in this proceeding and of the petition of Ship-By-Truck Company, Inc., doing business as Graham Ship-By-Truck, Kansas City, Mo., filed March 20, 1961, for reconsideration of the order of the Commission, The Transfer Board, entered February 24, 1961, petitions of Graves Truck Line, Inc., Salina, Kans., filed March 22, 1961, and of Topeka Motor Freight, Inc., Topeka, Kans., filed March 23, 1961, for waiver of the Rules and acceptance for reconsideration, tendered therewith, of the order of the Commission, The Transfer Board, entered February 24, 1961, granting the application under Section 212(b) of the Interstate Commerce Act, and the Rules and Regulations Governing Transfers of Rights to Operate as a Motor Carrier in Interstate or Foreign Commerce (49 C.F.R. 179), and for oral hearing and consolidation of the

proceeding with No. MC-FC 63432, Stevens Express, Inc.—Purchase Portion—S. & C. Transport Company, Inc., of the motion of Ship-By-Truck Company, Inc., to vacate the said order herein of February 24, 1961, for the reason that the transaction is subject to Section 5 of the said act; and of applicants' replies:

It appearing, That notice of the order of The Transfer Board was duly published in the Federal Register on March 3, 1961, that the wording of the said notice followed the usual form and such notice was not intended as a detailed and exact description of the operating rights involved, because such information is contained in the application on file in the offices of this Commission at Washington, D. C., and at the offices of the District Director and of the State Commission where the headquarters of the carriers involved are located, and may be examined at those offices; that transferee and transferor are carriers subject to the Act, but they own, lease, control, or operate less than 21 motor vehicles for purposes of transportation subject to Part II of the said Act, and the transaction accordingly is within the exemption of section 5(10);

It further appearing, That the petitions and motion set forth no facts or arguments which were not previously considered or which would establish that the transfer is subject to section 5, or that it was not properly approved under the said Rules, including sections 179.5(a) and 179.5(b) thereof; that other contentions of petitioners concern matters not pertinent to a determination of this proceeding; and that an oral hearing is not necessary to a determination of the matter:

It is ordered, That the requests for waiver of the Rules be, and they are hereby, granted, that the petitions and motion be, and they are hereby, accepted for filing, that the

tions be, and they are hereby, denied, and that the
ion be, and it is hereby, overruled.

By the Commission, Division 3, acting as an Appellate
ision.

Harold D. McCoy,
Secretary.

(Seal)

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No. 879

In the Supreme Court of the United States

OCTOBER TERM, 1962

SHIP-BY-TRUCK CO., INC., D/B/A
GRAHAM SHIP-BY-TRUCK COMPANY, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

MOTION TO AFFIRM

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v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action brought by appellants to set aside orders of the Interstate Commerce Commission. These orders, origi-

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nating in separate proceedings instituted at different times, granted approval, under the transfer rules[1] prescribed pursuant to Section 212(b) of the Interstate Commerce Act,[2] of a proposed sale and transfer by S. & C. Transport Co., Inc. (S. & C.), to Stevens Express, Inc. (Stevens) of a portion of the former's operating rights, and by Spencer Bros., Inc. (Spencer) to Stevens of all of Spencer's operating rights.

The issue is whether the transactions were subject to Commission authorization in accordance with the standards and procedures set forth in Section 5(2) *et seq.* of the Act,[3] as claimed by appellants, or in

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[1] The rules and regulations are set forth in 49 C.F.R. 179.

[2] Section 212(b), 49 U.S.C. 312(b), provides:

"Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe."

[3] Section 5(2)(a), 49 U.S.C. 5(2)(a), provides in part as follows:

"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *."

Section 5(10), 49 U.S.C. 5(10) provides as follows:

"(10) Nothing in this section shall be construed to require the approval or authorization of the Commission in the case

accordance with the transfer rules prescribed under Section 212(b), as the Commission decided.

The facts giving rise to this issue are not in dispute and are as follows:

On July 11, 1960, Stevens, a non-carrier, and S. & C., a motor common carrier, filed a joint application with the Commission seeking authority under Section 212(b) of the Act for Stevens to purchase a portion of the operating rights of S. & C.[4] On September 30, 1960, the Transfer Board of the Commission denied the application because the transaction was objectionable under one of the rules prescribed pursuant to Section 212(b).[5] On October 13, 1960, the applicants filed a petition for reconsideration which sought to remove this objection.[6] On December 7, 1960, Division 4 of the Commission, acting as an Appellate Division, granted the petition, vacated

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of a transaction within the scope of paragraph (2) where the only parties to the transaction are motor carriers subject to part II (but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1(z)), and where the aggregate number of motor vehicles owned, leased, controlled, or operated by such parties, for purposes of transportation subject to part II, does not exceed twenty."

[4] S. & C. was primarily an irregular route carrier; the transaction with Stevens involved only its regular route authority—a small part of the operating rights it owned.

[5] The objection was that the rights to be sold were not clearly distinguishable and severable from the rights retained in that both the transferor, over irregular routes, and the transferee, over regular routes, would be able to serve the same points in the transportation of the same commodities (see 49 C.F.R. 179.5, Rev. 1961).

[6] Applicants agreed to cancellation of the transferor's duplicating rights upon approval of the sale.

the denial entered by the Transfer Board and approved the transfer under Section 212(b). On February 1, 1961, the Commission was notified that the Stevens-S. & C. transaction had been consummated. After filing the necessary tariffs and complying with Commission regulations concerning insurance and process agents, Stevens commenced operations with two vehicles purchased from a source other than the transferor.

On October 19, 1960, while the Stevens-S. & C. petition for reconsideration was pending, an application was filed for approval of the transfer to Stevens of all the operating rights of Spencer, a motor carrier owning two units of highway equipment. On February 24, 1961 (after the Stevens-S. & C. transaction had been consummated), the Transfer Board, finding that both Stevens and Spencer were carriers owning less than twenty vehicles (and therefore within the exemption of Section 5(10), see pp. 2–3, fn. 3, *supra*), approved the Stevens-Spencer transaction under Section 212(b).

Appellants and others thereafter entered the picture for the first time. After the S. & C. transfer had been consummated and the Spencer transfer approved, they filed petitions for waiver of Rule 1.101(e),[1] petitions for reconsideration and motions to set aside the orders on various grounds. One ground was that the transactions were required to be approved under Section

[1] The petitions in the S. & C. matter were filed outside the time limits prescribed by Rule 1.101(e) of the Commission's General Rules of Practice, 49 C.F.R. 1.101(e).

5, on the theory that the status of the applicants must be determined as of the time the applications were filed; that, as of October 19, 1960, Stevens was a non-carrier attempting to purchase the operating rights of two motor carriers, S. & C. and Spencer, which together owned and operated more than twenty vehicles;[8] and that the transaction was therefore not exempted by Section 5(10).

On May 23, 1961, the Commission, Division 3, issued two separate orders (J.S. App. A11–13, A14–16), one in each case, accepting for filing the untimely petitions and motions, but denying them on the merits. The order of May 23 relating to the S. & C. transfer stated that in the absence of petitions seeking reconsideration of the order authorizing the transfer, the transaction was consummated on February 1, 1961; that prior to consummation Stevens was not a carrier; that the transaction was not subject to Section 5; and that it was not related to or dependent upon the transfer proposed in the then pending Stevens-Spencer application (J.S. App. A12). The order of May 23 relating to the Spencer transfer stated in substance that by February 24, 1961, when the Transfer Board had approved that transfer, Stevens had become a carrier as a consequence of the consummation

[8] Vehicles owned or operated by a party to a transaction are counted for purposes of determining the applicability of Section 5(10), even though they may not be the subject of the transfer for which approval is sought. It has been assumed that S. & C. owned or operated more than twenty in its entire operation, although the S. & C.-Stevens application does not disclose the number.

of the S. & C. transaction; and that since the Spencer transaction involved the sale and purchase of operating rights between two motor carriers owning less than twenty vehicles, it was within the exemption of Section 5(10) and thus did not require approval under Section 5.

On appeal, the district court concluded (J.S. App. A9–10), that the S. & C. transaction involved a transfer from a carrier to a non-carrier and was not subject to Section 5; that the later Spencer transaction involved a transfer between 2 carriers owning less than twenty vehicles and was exempt from Section 5 by the provisions of Section 5(10); and that the Commission acted within its authority in permitting the operating rights of S. & C. and Spencer to be transferred to Stevens in separate transactions under Section 212(b) of the Act.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court. Despite the inconsequential character of the transactions here in question (only four vehicles were required to operate all the rights involved), the three-judge district court carefully considered appellants' objections to the Commission's approval of the transactions under Section 212(b)—objections which were not brought to the attention of the Commission until after the S. & C. transaction had already been consummated. The district court's decision was entirely correct.

Section 5 of the Interstate Commerce Act, at least as it relates to motor carriers, is concerned in general with acquisitions of two or more carriers in a transaction of a substantial character. Section 212(b), on the other hand, and the rules prescribed under it, are designed to cover smaller and less complicated transactions. *United States* v. *Resler,* 313 U.S. 57; *Stearn* v. *United States,* 87 F. Supp. 596, 601–602 (W.D. Va.); *Atwood's Transport Line—Lease—Clarke,* 52 M.C.C. 97, 105–108.

Section 5, so far as here pertinent, provides that a noncarrier may acquire control of two or more carriers only if the Commission finds, in accordance with the standards set forth in Section 5(2)–(13), that the acquisition is consistent with the public interest. Section 5(10) affords an exemption, however, in the case "where the only parties to the transaction are motor carriers * * * and where the aggregate number of motor vehicles owned * * * or operated by such parties * * * does not exceed twenty." In such case, "any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe." Section 212(b). These rules and regulations have been prescribed (49 C.F.R. 179, Rev. Ed. 1961), and their purpose is to enable the Commission to ascertain the identity of the transferees in order to determine their fitness, willingness and ability to render service. *Abco Moving & Storage Co., Inc.—Purchase—Dierking,* 47 M.C.C. 557, 569.

Here, the Commission found that the S. & C. and Spencer transactions were not related or dependent, even though the applications for approval happened to be concurrently pending for a short period. By the time appellants filed their motions opposing the transfers, the S. & C. transaction had already been approved and consummated and Stevens had become a carrier. Its arrangement with Spencer, therefore, was within the exemption of Section 5(10) (because the total number of vehicles owned or operated was less than twenty) and was thus subject to approval under the transfer rules prescribed pursuant to Section 212(b), rather than under Secton 5. The Commission's decision was in keeping with the Congressional purpose to provide a means whereby transfers or mergers by small carriers could be effected without the delays and procedural complications required for more substantial transactions under Section 5. *United States* v. *Resler*, 313 U.S. 57, 60. In these circumstances the district court was plainly correct in upholding the Commission's ruling that the status of the parties was to be determined as of the date of consummation of the S. & C. transaction—or, what would amount to the same thing, as of the date appellants filed their motions—rather than as of the date the Spencer-Stevens application was filed, as appellants urge.

CONCLUSION

The appeal presents no substantial issue warranting plenary consideration and the judgment of the court below should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1962.

No. 879

SHIP-BY-TRUCK CO., INC., d/b/a

GRAHAM SHIP-BY-TRUCK COMPANY et al.,
Appellants,

vs.

UNITED STATES OF AMERICA et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

MOTION TO AFFIRM

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Appellants,

vs.

UNITED STATES OF AMERICA et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees, United States of America and Interstate Commerce Commission, move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action brought by

appellants to set aside orders of the Interstate Commerce Commission. These orders, originating in separate proceedings instituted at different times, granted approval under the transfer rules[1] prescribed pursuant to Section 212(b) of the Interstate Commerce Act,[2] of a proposed sale and transfer by S. & C. Transport Co., Inc., to Stevens Express, Inc., of a portion of the former's operating rights, and by Spencer Bros., Inc., to Stevens Express, Inc., of all of Spencer's operating rights.

The Facts concerning these transactions are not in dispute and occurred in the following chronological order:

On July 11, 1960, Stevens Express, Inc. (Stevens), a newly formed non-carrier corporation, and S. & C. Transport Company, Inc. (S. & C.), a motor common carrier, filed a joint application with the Commission seeking authority under Section 212(b) of the Act for Stevens to purchase a portion of the operating rights of S. & C.[3] The application was assigned Docket No. MC-FC-63432.

On September 30, 1960, the Transfer Board of the Commission denied the application because the rights to be sold were not clearly severable from the rights to be retained in that both the transferor, over irregular routes, and the transferee, over regular routes, both would be able to serve some points in Kansas.

On October 13, 1960, the applicants jointly petitioned for reconsideration agreeing to cancellation of all of transferor's duplicating rights upon approval of the sale.

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1. The rules and regulations are set forth in 49 C.F.R. 179.

2. Section 212(b), 49 U.S.C.A. 312(b), provides:

"Except as provided in Section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe."

3. Consisting of all regular route authority which constituted only a small part of the operating rights owned by S. & C.

On October 12, 1960, non-carrier Stevens, and Spencer Bros., Inc. (Spencer), a motor carrier owning two units of highway equipment, filed a joint application seeking authority under Section 212(b) of the Act, for Stevens to purchase all of Spencer's operating rights. This application was assigned Docket No. MC-FC-63698.

On December 7, 1960 Division 4 of the Commission, acting as an Appellate Division, granted the petition for reconsideration in the S. & C. proceeding and approved the transfer under Section 212(b) subject to a condition, revoking the portion of the irregular route operating rights of S. & C. which duplicated the regular route authority to be transferred to Stevens.

On February 1, 1961, the Commission was notified that the Stevens-S. & C. transaction had been consummated which elevated Stevens to the status of a carrier subject to the provisions of the Interstate Commerce Act. After complying with all applicable Commission regulations Stevens began operations with two vehicles purchased from a source other than the transferor.

On February 24, 1961, the Transfer Board approved the sale and transfer of the operating rights of Spencer, a carrier owning and operating two vehicles, to Stevens, now also a carrier owning and operating two vehicles. The transaction was approved under Section 212(b) as one involving the sale and purchase of operating rights between two carriers owning less than twenty vehicles.

Thereafter, appellants and others filed several petitions[4] and motions on various dates requesting reconsideration and to set aside the orders in Docket Nos. MC-FC-63432

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4. The petitions in the S. & C. matter were filed beyond the time permitted by Commission Rule 1.101(e). Waiver was sought.

and MC-FC-63698 on the jurisdictional grounds that both applications must be considered together under Section 5 of the Act because a non-carrier, Stevens, is attempting to purchase the operating rights of two motor carriers and the total number of vehicles involved exceeds twenty.[5]

On May 23, 1961, Division 3, acting as an Appellate Division, issued two separate orders (J.S. App. A11-13, A 14-16), one in each case, accepting the late filed petitions and motions for filing and denying the same on the grounds that they "* * * set forth no facts or arguments which were not previously considered or which would establish that the transfer was subject to Section 5, or that it should have been consolidated with No. MC-FC-63698, or that the transfer was not properly approved under the [transfer] rules, * * *". (J.S. App. A12).

On appeal, the district court concluded (J.S. App. A9-10), that the S. & C. transaction involved a transfer from a carrier to a non-carrier and was not subject to Section 5; that the later Spencer transaction involved a transfer between 2 carriers owning less than twenty vehicles and was exempt from Section 5 by the provisions of Sections 5(10); and, that the Commission acted within its authority in permitting the transfers of operating rights from S. & C. and Spencer to Stevens in separate transactions under Section 212(b) of the Act.

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5. Counting all the vehicles owned and operated by S. & C. and Spencer.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court. Appellants seek essentially to disregard the limited factual situation in challenging the legality of the Commission's wisdom of approving the unrelated and non-dependent applications by small carriers to transfer their operating rights in separate transactions under Section 212(b) of the Act. Each branch of the attack has been thoroughly considered and properly rejected by the Court below, and there is no need for further review.

1. Contending that the two transactions should have been regarded as one involving the acquisition by a non-carrier of control of two or more carriers within Section 5(2)[6], appellants initially allege (J.S. 11, 12) that the district court erred in sustaining the Commission's application of the rule that the status of the parties as of the date of actual consummation of the transaction is controlling in

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6. Section 5(2)(a) provides:

"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties or any part thereof, of another; or for any carrier or two or more carriers jointly to acquire control of another through ownership of its stock, or otherwise; *or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise;* or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise: * * *" (Emphasis supplied).

determining whether the provisions of Section 5(2) are applicable. Appellants argue (J.S. 13) that the Commission automatically acquired jurisdiction of both transactions under Section 5(2) upon the subsequent filing of the unrelated and non-dependent Spencer application because both applications were concurrently pending for some months before Stevens became a carrier upon approval and consummation of its purchase of the S. & C. rights.

These arguments lack merit. The Congressional purpose in enacting Section 5 was to facilitate mergers and consolidations in the national transportation system. Section 5(2)(a) is principally concerned with the bringing of two or more carriers under control or management in a common interest. *County of Marin* v. *United States*, 356 U.S. 412, 416 (1958); *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298.

For small motor carriers desiring to effect the transfer of a certificate or permit, or desiring to merge or consolidate where the total number of vehicles owned does not exceed 20, a specific exemption is provided in Section 5(10).[7] The intent of Congress obviously was to provide a means whereby such transfers or mergers by small carriers could be effected easily under rules and regulations prescribed under Section 212(b),[8] and without the delays and

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7. Section 5(10) provides:

"Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a transaction within the scope of paragraph (2) of this section where the only parties to the transaction are motor carriers * * * and where the aggregate number of motor vehicles owned, leased, controlled or operated by such parties, for the purposes of transportation * * * does not exceed twenty."

8. The rules were prescribed to enable the Commission to ascertain the identity of the transferees, actual as well as nominal, for the purpose of determining their fitness, willingness and ability to render operations in interstate commerce. *Alco Moving & Storage Co., Inc.—Purchase—Dierking*, 47 M.C.C. 557, 569.

procedure required for more substantial transactions under Section 5. *United States* v. *Resler*, 313 U.S. 57, 60 (1941).

The mere fact that two separate and unrelated applications for a non-carrier to acquire the operating rights of two carriers were concurrently pending for a short period of time is not controlling on the question of whether or not Section 5 applies unless the transactions were related and the survival of either depended upon the approval of both.[9] The Commission found that there was no reasonable justification, in terms of the public interest or otherwise, to warrant consolidation of both applications for consideration as a single transaction under Section 5 (J.S. App. B, p. A12). In terms of the statutory policy behind Section 5, the inconsequentiality of the transactions here in question is reflected in the fact these small carriers required a total of only four vehicles to operate all the rights involved.

On the basis of its own review of the administrative record in the light of the statutory language and the Congressional purpose, the Court below concluded (J.S. App. A6, 9-10) that the Commission properly rejected the claim of interdependency between the two unrelated transactions; applied the proper standard and acted within its authority in permitting the separate sales and transfers to Stevens under Section 212(b). There is no occasion for a second re-examination by this Court of that record. See

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9. The district court sustained the Commission's rejection of appellant's claim of interdependency of the two transactions finding that the transferors knew nothing about the other's proposed sale to Stevens; were not connected or affiliated with each other or with Stevens in any manner; and that the separately executed and independent contracts were not related to or dependent upon approval of the proposed transfer in the other (J.S. App. A9-10).

Federal Trade Commission v. *Standard Oil Co.*, 355 U.S. 396, 401; *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 491.

2. Appellants argue (J.S. 14), that the Commission erroneously placed the burden of establishing jurisdiction under Section 5 upon them. But there is no foundation in fact for this charge.

There is nothing in the orders of the Commission, or the opinion of the court below, which even remotely indicates that the Commission required appellants to carry the burden of establishing jurisdiction under Section 5(2). Rejection of appellants' effort to show a scheme or interdependency between the two transactions does not amount to a requirement that appellants must establish jurisdiction.

3. Appellants further complain (J.S. 15-16), that the Commission's separate approval of the two transactions under Section 212(b) ultimately results in the combining of operating rights of two carriers into a new service in direct competition with their existing services without a finding, as required by Section 5(2), that such a result will be consistent with the public interest. This charge has no foundation.

It was the Congressional intent that operating rights under Section 212(b) might be freely transferred so long as the public interest was not harmed thereby. *Stearn* v. *United States*, 87 F. Supp. 596, 601. Certainly, the Commission had the competitive consequences in mind, *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 532. Its approval indicates that the public interest would not be harmed. When, as the district court found (J.S. App. A10), the Commission's conclusions are rational under the par-

ticular factual situation, appellants may not complain that they would prefer the matter to be decided more to their own advantage. *McLean Trucking Co. v. United States*, 321 U.S. 67, 87-88; *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 92.

CONCLUSION

Since this appeal presents no substantial question warranting plenary consideration, the judgment of the Court below should be affirmed.

Respectfully submitted this 12th day of April, 1963.

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Attorney for Intervening Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on the day and date last shown above, a copy of the foregoing document was served upon all parties of record in this proceeding by mailing to each of them a copy thereof, first class mail, properly addressed with sufficient postage affixed.

J. F. MILLER,
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Shawnee Mission, Kansas,
Attorney for Intervening Defendants.

Date Due: April 15, 1963.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 879.

SHIP-BY-TRUCK CO., INC., d/b/a GRAHAM SHIP-BY-TRUCK COMPANY,

AND

GRAVES TRUCK LINE, INC.,
Appellants,

VS.

UNITED STATES OF AMERICA

AND

INTERSTATE COMMERCE COMMISSION,

AND

STEVENS EXPRESS, INC., S & C TRANSPORT COMPANY, INC., and SPENCER BROTHERS, INC.,
Appellees.

JOINT BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM.

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JOINT BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM.

Ship-By-Truck Co., Inc., d/b/a Graham Ship-By-Truck Company and Graves Truck Line, Inc., present this brief in opposition to motions of United States of America

and the Interstate Commerce Commission, and Stevens Express, Inc., S & C Transport Company, Inc., and Spencer Brothers, Inc., received April 15, 1963, which seek to affirm the judgment of the specially constituted three-Judge United States District Court for the District of Kansas, entered October 5, 1962, from which this direct appeal is taken.

The statement as to jurisdiction filed herein sets forth the basis of this Court's jurisdiction to entertain this direct appeal, the statement of the case, and a statement of the questions presented and their substantiality. In addition, it contains the opinion of the District Court and the final orders of Division 3 of the Commission, as appendices A, B and C thereto, respectively.

Appellants assert that the questions presented by this appeal are substantial and merit plenary consideration by this Court upon full brief and argument, after which the judgment of the District Court should be reversed and the cause remanded to the Interstate Commerce Commission for proceedings under Section 5 of the Interstate Commerce Act [49 U.S.C., Section 5].

SUMMARY OF ARGUMENT.

The issue before the Court involves two basic questions which are necessarily interrelated. The first question is whether a transaction whereby a non-carrier is seeking to purchase the operating rights of two carriers must be handled under Section 5, the answer to which must necessarily involve consideration of Section 5(10) of the Interstate Commerce Act, which exempts transactions from Section 5 where (a) all the parties to the transaction are motor carriers, and (b) assuming the first test applies,

whether the parties in the aggregate operate in excess of 20 vehicles subject to part II of the Act.

The second question presented is, assuming the Commission may determine that such a transaction is entitled to exemption from Section 5 by virtue of Section 5(10), have the applicants presented such substantial, probative and competent evidence to allow the Commission to make a finding of its jurisdiction to determine whether the transaction is subject to Section 5.

ARGUMENT.

The issue before the Court here involves the construction of the Interstate Commerce Act in respect to the applicability of Section 5, *vis-a-vis* Section 212(b), and a determination as to where the Commission's jurisdiction lies in a transaction where a non-carrier is attempting to purchase the operating rights of two motor carriers.

As stated by the applicants before the Commission in their motion to affirm, Section 5(2) is principally concerned with the bringing of two or more carriers under control or management in a common interest, citing *County of Marin* v. *United States*, 356 U.S. 412, 416 (1958); *St. Joseph Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298.

The issue presented to this Court by appellants involves a determination of where jurisdiction lies and the Court must necessarily determine the substantiality of that question in deciding whether to note probable jurisdiction. Appellees have entirely missed the point in arguing that the substantiality of the transaction itself is the question which controls. Their contention is misplaced.

Both motions argue that the routes involved are so inconsequential that only four vehicles are required to provide the necessary service. Appellants operate the routes and serve the points involved, collectively operating hundreds of vehicles in that service. The ultimate adverse effect on appellants is of great concern to them, and their revenue subject to diversion runs into Hundreds of Thousands of dollars.

If jurisdiction turned on the size of the transaction, (here involving the $90,000 purchase price, operating capital and equipment investment), then perhaps the commission did not err; however, this is not the case. Section 5(2) of the Act specifically takes jurisdiction of a situation where a non-carrier seeks to acquire two or more carriers, and Section 5(10) of the Act exempts the transaction from Section 5(2) only where all the parties are motor carriers.

What logic is there in the appellee's argument and the lower court's finding that the two vendors knew nothing of the sale of the other's rights to vendee? The result was known to vendee, and the benefits of the "common interest" would accrue only to vendee. Certainly common scienter on the part of the vendors cannot be controlling. To divulge such information might have cost the vendee a valuable business transaction. What benefit would there be to vendee to divulge such information? None.

Appellees argue that the Commission certainly had the competitive consequences in mind, citing *U. S. v. Pierce*, 327 U.S. 515, 532. There is no evidence before the Commission upon which to base such a finding. In fact, there is no way under Section 212(b) to present comprehensive evidence of such a nature. The only way such evidence can be adduced is through hearing, with opportunity allowed for cross-examination of applicant's witness, and op-

position evidence adduced by protestants. The skeletal nature of the evidence before the Commission in this matter cannot even be blessed with the term "scintilla".

We respectfully urge that the question is not the size of the transaction where a non-carrier attempts to acquire two carriers, but whether jurisdiction under Section 5(2) can be abrogated at all.

CONCLUSION.

Appellants contend that even if the Commission had "discretion" to determine whether the instant transaction came under the jurisdictional requirements of Section 5 or Section 212(b), that there was not suffieient evidence submitted by the applicants to afford the Commission evidence of a substantial or competent nature to make such a decision. Reference to the underlying record in this case will make this immediately clear.

In any event, the appellees in their motions to dismiss have not discussed the substantiality of the issue before this Court.

The issues in this case are of first impression for this Court and for the Federal Courts generally. Mergers, consolidations and other transactions of like nature are constantly being sought by the motor carrier industry in its attempt to expand. Means of accomplishing such transactions with the least risk of failure are constantly being researched by not only the industry but the industry's legal counsel, who are generally specialists in the field. Where carriers are given the right to avoid proceeding under Section 5 of the Act the possibilities are endless and, in effect, the Commission has opened Pandora's Box.

Because of the substantiality of all the issues raised by this appeal, we respectfully pray that the Motions to Affirm be denied and ask that probable jurisdiction be noted.

Respectfully submitted,

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